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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

7 LOCALS 302 AND 612 OF THE
8 INTERNATIONAL UNION OF
9 OPERATING ENGINEERS
10 CONSTRUCTION INDUSTRY HEALTH
AND SECURITY FUND, *et al.*,

11 Plaintiffs,

12 v.

13 ACE PAVING CO., INC.,

14 Defendant.

Case No. C11-1257RSL

ORDER STRIKING MOTION
FOR SUMMARY JUDGMENT

15 This matter comes before the Court on Plaintiffs' motion for summary judgment
16 (Dkt. # 4). Plaintiffs ask the Court to conclude that no genuine issue of material fact
17 exists and award them actual and liquidated damages, as well as interest, costs, and fees.
18 The Court is precluded from reaching the merits of Plaintiffs' motion, however, because
19 it has yet to be served on Defendant. Accordingly, the Court STRIKES the motion.

20 Plaintiffs served their summons and complaint on Defendant on August 11, 2011.
21 Dkt. # 3. The Court gathers from Plaintiffs' motion that Defendant has answered that
22 complaint. Mot. (Dkt. # 4) at 4 ("Ace even admits in its Answer . . ."). Defendant has
23 not, however, filed an answer or any other document with this Court. Nor has counsel
filed an appearance on Defendant's behalf.

24 On December 15, 2011, Plaintiffs filed the present motion. The accompanying
25 certificate of service states that Plaintiffs "electronically filed the Motion . . . with the

1 Clerk of the Court using the CM/ECF system which will send notification of such filing
2 to” Joel C. Merkel. Presumably, Mr. Merkel is the author of the yet-to-be-filed answer.

3 Ordinarily, Plaintiffs would not need to do anything more. Federal Rule of Civil
4 Procedure 5(b)(2)(E) permits service of written motions by “electronic means if the
5 person consented in writing,” and our Local Rules make clear that “[a] paper properly
6 filed by electronic means in accordance with the court’s Electronic Filing Procedures for
7 Civil and Criminal Cases is service for purposes of” that Rule. CR 5(b).

8 The hitch in this case is that consent to service via the Court’s Electronic Filing
9 system is accorded on a case-by-case basis, and counsel cannot consent prior to
10 appearing. Because Mr. Merkel has never formally appeared, the Court’s Electronic
11 Filing system did not alert him of or forward him a copy of Plaintiffs’ motion. Unless
12 Plaintiffs’ personally served him or the Defendant, neither would have any knowledge
13 of the present motion—which undoubtedly explains why no response was filed.

14 In sum, while the Court believes that Plaintiffs honestly thought that their motion
15 would be served on Defendant, it unquestionably was not. For all of the foregoing
16 reasons, the Court STRIKES Plaintiffs’ motion for lack of service. The Clerk is directed
17 to forward a copy of this Order to Joel C. Merkel, Jr., at joelmerkel@gmail.com and
18 Joel C. Merkel, Sr., at joel@merkellaw.com.¹

19 DATED this 21day of February, 2012.

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22 Robert S. Lasnik
23 United States District Judge

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25 ¹ The Court notes that both appeared on Defendant’s behalf in a related matter
26 (2:11-cv-01367-MAT). As discussed, it is unclear if either represent Defendant in this matter.